Supreme Court U.S.
FILED

No. 981275 FEB 8 '99

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROSE CONSTANTINO,

Petitioner,

vs.

THE UNIVERSITY OF PITTSBURGH; ANN YURICK; KAREN MOLCAN; THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the lower court misinterpret a decision of this Court in concluding that a professor was not deprived of a federally protected property interest when a state university defamed her, and terminated certain of her teaching responsibilities without advance notice or a hearing?

II. If the Third Circuit's interpretation of *Paul v. Davis* was correct, should this Court re-examine that decision in light of the Court's earlier decisions interpreting 42 U.S.C. § 1983? In that Pennsylvania is different than Kentucky.

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OPINIONS BELOW

The unpublished Memorandum Opinion of the United States Court of Appeals for the Third Circuit is reprinted in the Appendix at App. 1a. The Memorandum Order of the United States District Court for the Western District of Pennsylvania, Civil Action No. 97-226, is reprinted in the Appendix at App. 9a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, filed on November 9, 1998, affirmed the order of the United States District Court for the Western District of Pennsylvania, which dismissed the petitioner's complaint.

On February 10, 1997, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in connection with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Local Rule 72.1.3.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Article 1, Section 1, of the Pennsylvania Constitution provides in relevant part:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

Article 1, Section 11, of the Pennsylvania Constitution provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Title 42, Section 1983, of the United States Code provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Petitioner Rose Constantino is a tenured member of the faculty of the School of Nursing of the Respondent University of Pittsburgh ("Pitt"). The Respondent Ann Yurick ("Yurick") is Chairperson of the School of Nursing. During the Spring Term of 1996, Dr. Constantino supervised clinical work being performed by nursing students at the Western Psychiatric Institute and Clinic ("WPIC") of the Respondent University of Pittsburgh Medical Center. The Respondent Karen Molcan is the clinical administrator and performance evaluator at the WPIC.

In February, 1996, Dr. Constantino was notified by Pitt that her clinical teaching duties at WPIC had been discontinued. In response, Dr. Constantino filed a complaint in federal court.

On February 10, 1997, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in connection with the Magistrates Act, 28 U.S.C. §§ 636(b)(1)(A) and (B), and Local Rule 72.1.3.

Dr. Constantino's complaint contained three counts. The first count, which alleged a violation of 42 U.S.C. § 1983, was based on two letters that had been written about Dr. Constantino. Dated February 16, 1996, the first letter was from Molcan to Ellen Rudy, Dean of Pitt's School of Nursing. The letter referred vaguely to "several incidents" involving Dr. Constantino that were "problematic for the operation" at the WPIC. Molcan requested that Dr. Constantino be permanently removed from WPIC. The second letter, dated February 27, 1996, was sent by Yurick to Dr. Pamela Hepple, Chair of the Dean's Distinguished Teaching Award committee. The letter stated that Dr. Constantino was involved in certain unspecified problems and that her teaching responsibilities at the WPIC had been

reassigned to another faculty member. Yurick, who had received a copy of Molcan's letter from Dean Rudy, did not mention in her letter the details of the allegations against Dr. Constantino.

At the time of the letters, Dr. Constantino was seeking a Dean's Distinguished Teaching Award from the School of Nursing. After the letters were sent, she did not receive the award. The crux of Dr. Constantino's § 1983 complaint is that the publication of the letters written by Molcan and Yurick "harmed her reputation, stopped her from receiving the Distinguished Teaching Award and impair[ed] her opportunity for promotion to full professor." Dr. Constantino also contended that, because she was not given a "meaningful pre-deprivation hearing" or a "post-deprivation procedure to expunge the record," her constitutional rights under § 1983 were violated.

The two other counts in Dr. Constantino's complaint alleged pendent state law claims. Count II stated a defamation claim against the Pitt Medical Center and Molcan; Count III states a defamation claim against Pitt and Yurick.

The Respondents moved to dismiss under Fed. R. Civ. P. 12(b)(6). The District Court, following the recommendation of the magistrate judge, dismissed Count I with prejudice and dismissed Counts II and III without prejudice. The District Court declined to exercise pendent jurisdiction over the state law claims.

Dr. Constantino filed a timely notice of appeal to the Third Circuit, which took jurisdiction under 28 U.S.C. § 1291. The Third Circuit exercised plenary jurisdiction over the appeal. In a Memorandum Opinion written by Circuit Judge Sloviter, the court below concluded that Dr. Constantino did not present a federally protected property interest in her § 1983 claim and held that the District Court did not err in dismissing her federal due process claim with prejudice.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURT MISINTERPRETED A DECISION OF THIS COURT IN CONCLUDING THAT DR. CONSTANTINO WAS NOT DEPRIVED OF A FEDERALLY PROTECTED PROPERTY INTEREST.

The Third Circuit rejected Dr. Constantino's assertion that this Court's decision in *Paul v. Davis*, 424 U.S. 693 (1976), did not apply under the facts of her case. In so doing, the court below misinterpreted *Paul* and prejudiced Dr. Constantino's rights under 42 U.S.C. § 1983.

In *Paul*, a man employed by the local newspaper claimed that city and county police chiefs had defamed him when they included a photograph of him in a "flyer" of "active shoplifters" after he had been arrested on a shoplifting charge, which was later dismissed. He contended that the chiefs' use of his photograph and designation of him as an "active shoplifter" would

> inhibit him from entering business establishments for fear of being suspected of shoplifting and possibly apprehended, and would seriously impair his future employment possibilities.

424 U.S. at 697. This Court held that the man's claim regarding the chiefs' conduct, standing alone and apart from any other governmental action with respect to him, did not state a claim for relief under 42 U.S.C. § 1983 and the Fourteenth Amendment.

This Court recognized in *Paul* that

> there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

424 U.S. at 710-11. The Court's holding was directly based on this fact:

> Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation that has been altered as a result of petitioners' actions. Rather his interest is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions.

424 U.S. at 711-12. Thus, the Court concluded that the police chiefs' defamatory publications, regardless of how seriously they may have harmed the man's reputation, did not deprive him of any liberty or property interests protected by the Due Process Clause. 424 U.S. at 712.

The decision in *Paul* rests on the absence of any protection in Kentucky law, beyond the law of defamation, of an individual's reputation. A citizen of Pennsylvania, on the other hand, enjoys special protection of his reputation by virtue of Article 1, Section 1 of the Constitution, which states in relevant part:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.

The Commonwealth Court of Pennsylvania recognized this distinction between Kentucky and Pennsylvania law, and refused to follow *Paul* on that basis, in *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850, 855 (1992). The Commonwealth Court relied primarily on the decision of the Supreme Court of Pennsylvania in *Hatchard v. Westinghouse Broadcasting Co.*, 516 Pa. 184, 532 A.2d 346 (1987). The Pennsylvania Supreme Court emphasized in *Hatchard* the "special value" that the Pennsylvania Constitution places on a party's reputation. The court cited a second provision of the Pennsylvania Constitution in support of its stand. Article 1, section 11, provides:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

532 A.2d at 350-51.

Thus, the Third Circuit misinterpreted *Paul* when it applied it to Dr. Constantino's § 1983 claim, notwithstanding the differences between the laws of Kentucky and Pennsylvania regarding the value of an individual's reputation. Even a cursory reading of *Paul* compels the conclusion that it rests on the

absence of any special protection in Kentucky's law regarding an individual's expression. It bears repeating that this Court emphasized in *Paul* that "Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of respondents' actions." 424 U.S. at 711-12.

Dr. Constantino's case is clearly distinguishable from the facts in *Paul*. The Third Circuit erred in applying *Paul* under these facts.

II.

IF THE THIRD CIRCUIT'S INTERPRETATION OF *PAUL* WAS CORRECT, THEN THIS COURT SHOULD TAKE THIS OPPORTUNITY TO RE-EXAMINE *PAUL* IN LIGHT OF PRECEDENT.

Assuming, for the sake of argument, that the Third Circuit correctly interpreted this Court's holding in *Paul* as precluding Dr. Constantino from obtaining a remedy under 42 U.S.C. § 1983, then it is respectfully suggested that this Court take this opportunity to re-examine *Paul* and clarify its holding in that case. It should go without saying that section 1983 provides a remedy that is frequently sought by plaintiffs who feel that their rights have been trammeled upon by government officials and employees. If this Court grants certiorari in this case, the outcome will have a wide-ranging impact on many other cases. A close reading of *Paul* and earlier decisions of this court that interpret section 1983 raises significant questions. *Paul* appears to clash with, without expressly overruling, other section 1983 cases cited in that decision. For example, it would seem that *Paul* directly contradicts this Court's earlier statement in *Monroe v. Pape*, 365 U.S. 167 (1961), regarding the availability of section 1983 protection in cases such as this one:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

365 U.S. at 183. It is important to remember that the essence of a section 1983 action is abuse of a public official's official position. As stated in *Monroe*: "Congress, in enacting [section 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." 365 U.S. at 172.

This Court made the same point in another way when it explained in *United States v. Classic*, 313 U.S. 299, 326 (1941), that section 1983 focuses on "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."

Viewed in light of these earlier pronouncements on section 1983, Dr. Constantino should have been granted her day in court. The conduct of which Dr. Constantino complains was intentionally undertaken by state employees in their official capacities. By defaming her with vague allegations of improper conduct on her part, these state university employees stigmatized Dr. Constantino with faint condemnation and placed a blot on her record that will continue to haunt her during the remainder of her career in academe. Their actions amounted to abuses of their power, made all the worse because these administrators were clothed with the authority of state law.

The damage suffered by Dr. Constantino can be minimized only by those who have never held positions in academe, where rumors circulate faster than in a small town and reputations can be destroyed by the merest whiff of innuendo. Academe is

perhaps the only environment in which passive-aggressive behavior is not merely rewarded, it is mandatory for survival. Dr. Constantino was savaged as thoroughly by these vague remarks in the administrators' letters as if she had been mugged in a hallway by a masked intruder.

That Dr. Constantino remains a tenured member of the faculty does not negate the harm that she has suffered. Should she seek a position at another university, this matter is likely to stalk her and foreclose her options. She may be forever prevented from achieving the rank of Full Professor, a status that in some universities carries with it substantial financial benefits, as well as enormous prestige.

In short, what happened to Dr. Constantino cries out for a remedy in addition to those available in state court. The harm she suffered was all the more egregious because it was at the hands of administrators who wielded the imprimatur of the Commonwealth of Pennsylvania when they trashed her reputation. Dr. Constantino was and is entitled to expect more from her state's officials; that is the essence of the protections afforded by section 1983.

CONCLUSION

Dr. Constantino's section 1983 action, based on her denial of due process, should have been permitted to go forth. The actions of the administrators of this state university did more than deny Dr. Constantino a possible reward for excellence in teaching. The administrators deprived her of her rights to property and liberty under the laws of Pennsylvania, as set forth in its Constitution and case law.

If this Court grants certiorari in this matter, it will clarify the meaning and effect of its decision in *Paul v. Davis* and erect a lighthouse to guide future litigants who wish to invoke the protections of section 1983.

Accordingly, Dr. Constantino respectfully requests that her petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED NOVEMBER 9, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3585

ROSE CONSTANTINO,

Appellant

v.

THE UNIVERSITY OF PITTSBURGH; ANN YURICK; KAREN MOLCAN; THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 97-cv-00226)
(District Judge: Hon. Donald J. Lee)

Statement Pursuant to Third Circuit LAR 34.1(a)
October 29, 1998

Before: SLOVITER and GARTH, *Circuit Judges*
and MAGILL, *Circuit Judge*[*]

(Opinion Filed NOV 09 1998)

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* The Honorable Frank J. Magill, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

MEMORANDUM OPINION

SLOVITER, *Circuit Judge.*

I.

Plaintiff Dr. Rose Constantino appeals from the district court's order granting the motions of defendants University of Pittsburgh, University of Pittsburgh Medical Center, and two employees of the institutional defendants, Ann Yurick and Karen Molcan, to dismiss her claim filed under 42 U.S.C. § 1983, with prejudice.

Constantino is a tenured faculty member of the School of Nursing at the University of Pittsburgh ("Pitt"); Yurick is Chairperson of the School of Nursing. During the Spring Term of 1996, Constantino's duties involved the supervision of clinical work being performed by nursing students at the Pitt Medical Center's Western Psychiatric Institute and Clinic ("WPIC"), where Molcan is the clinical administrator and performance evaluator. In February 1996, Constantino was notified by Pitt that her clinical teaching duties at WPIC had been discontinued. Thereafter, Constantino filed a complaint in federal court.

Constantino's complaint contains three counts. The first, the federal claim filed under 42 U.S.C. § 1983, is based on two letters about Constantino. The first letter, dated February 16, 1996, was from Molcan to Ellen Rudy, Dean of Pitt's School of Nursing. It did not contain any specific allegations of misconduct on the part of Constantino but referred to "several incidents" that are "problematic for the operation" at WPIC; Molcan requested that Constantino be permanently removed

from WPIC. The second letter dated February 27, 1996, was from department chair Yurick to Dr. Pamela Hepple, Chair of the Dean's Distinguished Teaching Award committee, advising that Constantino was involved in certain unspecified problems and that her teaching responsibilities at the WPIC had been reassigned to another faculty member. Yurick had received a copy of Molcan's letter from Dean Rudy. Yurick did not elaborate in her letter on the details of the allegations against Constantino.

At the time of these letters, Constantino was seeking a Dean's Distinguished Teaching Award from the School of Nursing, which she did not thereafter receive. However, Constantino is still employed by Pitt as a tenured member of the faculty, and has not alleged a loss of salary or rank in her employment. Her § 1983 claim alleges that the publication of the letters written by defendants Molcan and Yurick "harmed her reputation, stopped her from receiving the Distinguished Teaching Award and impairs her opportunity for promotion to full professor." Appellant's Br. at 3. Constantino also claims that because she was not given "a meaningful pre-deprivation hearing" or a "post-deprivation procedure to expunge the record," her constitutional rights under § 1983 were violated.

Constantino's two other counts allege pendent state law claims. Count II is a defamation claim brought against the Pitt Medical Center and Molcan, its employee. Count III is a defamation claim against Pitt and Yurick.

Defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). The district court, following the recommendation of the magistrate judge, dismissed Count I with prejudice and dismissed Counts II and III without prejudice, declining to

exercise pendent jurisdiction over the state law defamation claims. Constantino filed a timely notice of appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291. Our review is plenary. We have stated, "whether there is a protected interest sufficient to trigger constitutional protection is an issue of law over which our review is plenary." *Clark v. Township of Falls*, 890 F.2d 611, 617 (3d Cir. 1989).

II.

To state a viable claim under § 1983, Constantino must demonstrate deprivation of a federally secured right. Following the Supreme Court's precedent in *Paul v. Davis*, 424 U.S. 693 (1976), which declares that a person's reputation alone is insufficient to establish a property interest for purposes of due process, this court has held that "mere damage to reputation, apart from the impairment of some additional interest previously recognized under state law, is not cognizable under the due process clause." *Sturm v. Clark*, 835 F.2d 1009, 1012 (3d Cir. 1987); *accord Clark*, 890 F.2d at 620.

Anticipating that the defendant would rely on *Paul*, Constantino argues that her case differs from *Paul* because Pennsylvania courts have recognized that reputation is a fundamental right under the Pennsylvania Constitution, *see Hatchard v. Westinghouse Broad.*, 516 Pa. 184, 532 A.2d 346 (1987); *Pennsylvania Bar Ass'n v. Commonwealth*, 147 Pa. Commw. 351, 607 A.2d 850 (1992); therefore, reputation is a property interest entitled to the protection of procedural due process under § 1983. Constantino's argument must fail.

The Pennsylvania Commonwealth Court expressly recognized that there is a significant difference between

Pennsylvania and federal law on this issue. It declined to follow *Paul* as requested while at the same time adhering to state precedent authorizing suit for reputation alone in suits under the same law. *Pennsylvania Bar Ass'n*, 607 A.2d at 855-86. Therefore, Constantino cannot bootstrap based on Pennsylvania law.

Nor is Constantino's proffering of the ability to apply for a teaching award adequate to provide the "additional interest" necessary for overcoming this court's requirements as established in *Sturm*. Assuming arguendo that the inability to apply for future awards constitutes "loss of the privileges of rank," Appellant's Br. at 4, nothing even suggests that Pitt has foreclosed her from so applying. Additionally, she has no property interest in the awards themselves, which are conferred in the university's discretion, and no property interest in receipt of a future promotion in rank or increase in her salary. *See, e.g.*, *Clark*, 890 F.2d at 620 (possible loss of future employment opportunities "patently insufficient" to satisfy requirement imposed by *Paul*); *Robb v. City of Philadelphia*, 733 F.2d 286, 293 (3d Cir. 1984) (promotion based on performance, not taken as of right, provides no protected property interest); *cf. Robertson v. Fiore*, 62 F.3d 596, 601 (3d Cir. 1995) (finding no legal or administrative disability to pursue career opportunities).

In conclusion, because Constantino has presented no federally protected property interest, the district court did not err in dismissing her federal due process claim with prejudice.

Appendix A

III.

For the reasons stated above, we will affirm the order of the district court dismissing Constantino's complaint.

TO THE CLERK:

Please file the foregoing opinion.

s/ [illegible]
Circuit Judge

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3585

ROSE CONSTANTINO,

Appellant

v.

THE UNIVERSITY OF PITTSBURGH; ANN YURICK; KAREN MOLCAN; THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 97-cv-00226)
(District Judge: Hon. Donald J. Lee)

Before: SLOVITER and GARTH, *Circuit Judges*
and MAGILL, *Circuit Judge*[*]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on October 29, 1998.

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* The Honorable Frank J. Magill, of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix A

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the District Court entered October 23, 1997 be, and the same is, hereby affirmed. Costs taxed against appellant.

Attest:

s/ P. Douglas Sisk
Clerk

NOV 09 1998

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 23, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 97-226
JUDGE DONALD J. LEE
MAGISTRATE JUDGE BENSON

ROSE CONSTANTINO,

Plaintiff,

v.

THE UNIVERSITY OF PITTSBURGH, ANN YURICK, KAREN MOLCAN, and THE UNIVERSITY OF PITTSBURGH MEDICAL CENTER,

Defendants.

MEMORANDUM ORDER

On February 10, 1997, this case was referred to United States Magistrate Judge Kenneth J. Benson for pretrial proceedings in accordance with the Magistrates Act, 28 U.S.C. §636(b)(1)(A) and (B), and Local Rule 72.1.3.

The magistrate judge's report and recommendation, filed on October 3, 1997, recommended that the motion to dismiss filed by defendants (Docket #7) be granted. The parties were allowed ten (10) days from the date of service to file objections.

Appendix B

Service was made on all counsel by first-class mail on October 3, 1997. Objections were filed by plaintiff on October 7, 1997 (Docket #20), and on October 17, 1997, defendants filed a response to plaintiff's objections (Docket #21). After *de novo* review of the pleadings and documents in this case, together with the report and recommendation, objections and response thereto, the following order is entered:

AND NOW, this 23rd day of October, 1997;

IT IS HEREBY ORDERED that defendants' motion to dismiss (Docket #7) is GRANTED.

The report and recommendation of United States Magistrate Judge Kenneth J. Benson, dated October 3, 1997 (Docket #19), is adopted as the opinion of the court.

s/ Donald J. Lee
DONALD J. LEE
UNITED STATES DISTRICT JUDGE